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April 18, 2013

Jeff S. Jordan  
Federal Election Commission  
999 E Street, NW, 6th Floor  
Washington DC 20463

**Re: Response to Complaint, MUR 6722 and 6723**

Dear Mr. Jordan:

On behalf of House Majority PAC ("HMP"), and Shannon Roche in her official capacity as treasurer, this letter responds to the complaints in the above referenced matters. The complaints fail to state any violation of the Federal Election Campaign Act, 2 U.S.C. § 431 et seq., and should be dismissed immediately.

### BACKGROUND

Filed by the same complainant, and identical except for their inconsistent attempts to change the names of the respondents,<sup>1</sup> the complaints focus on a web video HMP produced in January 2013 that described its involvement in the 2012 election cycle.<sup>2</sup> HMP is an independent expenditure-only committee organized under Commission rules; it supports Democratic candidates for the U.S. House of Representatives.<sup>3</sup>

The web video is available only on the HMP website and on HMP's YouTube page. The complaints do not allege that the web video was distributed anywhere other than on the Internet. HMP has not placed it for a fee on any website, nor has it distributed the web video through broadcast, cable, satellite, or non-Internet media. The web video includes brief appearances by seven newly elected U.S. Representatives who benefitted from HMP's 2012 efforts, including Representatives Raul Ruiz and Ami Bera of California.

<sup>1</sup> The complaint in MUR 6722 is directed against Representative Raul Ruiz. The complaint in MUR 6723 is directed against Representative Ami Bera and alleges: "Because Ami Bera appeared in the Video, which has been distributed widely since posted on YouTube, it is impossible to argue that the Video is considered to be something of value to Raul Ruiz and his campaign committee." Complaint, MUR 6723, at 2.

<sup>2</sup> The video is available at <http://www.youtube.com/watch?v=F4JFEFqNheQ> ("We Make the Difference").

<sup>3</sup> See, e.g., Advisory Opinion 2011-12.

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The web video seeks to promote HMP by calling attention to its successful past efforts on behalf of Democratic candidates. It does not expressly advocate the election of any candidate, nor does it republish any candidate's campaign materials. In the web video, the Representatives who appear discuss the challenges they faced in the 2012 election cycle, the impact that HMP had in their particular races, and their gratitude for HMP's past support. While the web video does not solicit funds, a clear and conspicuous disclaimer appears on the bottom of the screen during each testimonial, reading: "[NAME OF REPRESENTATIVE] IS NOT ASKING FOR FUNDS OR DONATIONS."

### LEGAL DISCUSSION

While failing even to acknowledge the Commission's coordination rules, the complaints try to allege that the web video's production costs constitute in-kind contributions to Representatives Ruiz and Bera, respectively. In place of legal argument, the complaint appears to rely on the conclusory assertion that the videos constituted "something of value" to the two Members.

However inadvertently, the complaints state the correct legal conclusion: "it is impossible to argue that the Video is considered to be something of value" to the Members and their campaigns.<sup>4</sup> Commission regulations set forth a clear, three-pronged test for "coordinated communications" that the web video fails to meet. To be coordinated under Commission rules, and hence treated as an in-kind contribution, a communication must: (1) be paid for by a person other than the candidate, authorized committee, or political party committee; (2) satisfy one or more of the five content standards set forth in § 109.21(c); and (3) satisfy one or more of the conduct standards set forth in § 109.21(d).<sup>5</sup>

The web video fails to satisfy the content prong of this test. It does not satisfy § 109.21(c)(1) because it is not a broadcast, cable or satellite communication, and hence not an "electioneering communication."<sup>6</sup> Each of the four remaining content standards requires the communication to be a "public communication."<sup>7</sup> However, Internet communications that are not placed for a fee on another website are explicitly excluded from the definition of "public communication" found at 11 C.F.R. § 100.26.<sup>8</sup>

<sup>4</sup> Complaint, MUR 6722, at 2; Complaint, MUR 6723 at 2. As noted above, the complaint in MUR 6723, directed at Representative Bera, erroneously refers to Representative Ruiz in the quoted sentence.

<sup>5</sup> 11 C.F.R. § 109.21(a).

<sup>6</sup> 11 C.F.R. § 100.29.

<sup>7</sup> 11 C.F.R. § 109.21(c)(2), (3), (4) and (5).

<sup>8</sup> Even if it were a public communication, the video would still not be considered a "coordinated communication" because its underlying content does not satisfy any of the other regulatory requirements of § 109.21(c)(2)-(5). It does not disseminate, distribute or republish campaign materials prepared by a candidate, as required by 11 C.F.R. § 100.29(c)(2). *See, e.g.,* AO 2006-29 (Bono) (holding that a television infomercial featuring an appearance by a candidate does not satisfy 11 C.F.R. 109.21(c)); *see also* Statement of Reasons, MUR 6044 (Musgrove) July 14, 2009, at 4 (candidate's active participation in filming of advertisement does not satisfy republication standard of content prong). Moreover, the web

This bright-line rule reflects the Commission's clearly expressed desire to keep Internet content such as this unburdened by regulation to the greatest extent possible. In its 2006 Rulemaking on Internet Communications, the Commission took pains to emphasize that "the vast majority of Internet communications are, and will remain, free from campaign finance regulation," and stressed the need to "narrow the scope and impact of any regulation of Internet activity and establish bright line regulations to delineate any restricted activity in order to avoid chilling political participation and speech on the Internet."<sup>9</sup> Although it expanded the definition of "public communication" to include paid Internet advertising, the Commission clarified that this new definition "does not encompass *any other form* of Internet communication."<sup>10</sup> It specifically noted that "[t]he definition of 'public communication' does not encompass any content... that a person places on his or her own website. Therefore [such content] cannot constitute a 'coordinated communication.'" This type of transmission of information on the Internet "would not constitute in-kind contributions."<sup>11</sup> Thus, HMP's web video falls squarely within the category of speech that the Commission intended to shield from regulation.

The Commission has since affirmed that web communications not placed for a fee do not trigger the coordination rules. In Advisory Opinion 2011-14, the Utah Bankers Association Action PAC ("UBAAPAC") wanted to launch a communication consisting of a public website and an email list that would reach and solicit members of the general public for contributions to particular federal candidates, and it asked the Commission whether these Internet and email based solicitations would result in in-kind contributions to federal candidates. Engaging in the analysis outlined above, the Commission found that the public website and email list were not "electioneering communications" or "public communications," and therefore were not "coordinated communications" under § 109.21, and thus would not be considered in-kind contributions to the federal candidates.<sup>12</sup> Unlike HMP's web video, UBAAPAC's communications actually involved express advocacy and direct solicitations for federal candidates. Nonetheless, the Commission relied on the content prong to find that there would be no coordinated communication. It declined to apply the general coordination provision at § 109.20(b) to UBAAPAC's proposed communication, noting that the provision is intended for coordinated expenditures other than communications.<sup>13</sup> This follows clear guidance

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video contains no express advocacy, nor any language that is the functional equivalent of express advocacy, as required by 109.21(c)(3) or (5). And its release falls far outside of the proximity to an election required by 109.21(c)(4).

<sup>9</sup> Explanation and Justification, Regulations on Internet Communications, 71 Fed. Reg. 18589, 18590-91 (May 12, 2006).

<sup>10</sup> *Id.* at 18589 (emphasis added).

<sup>11</sup> *Id.* at 18500.

<sup>12</sup> AO 2011-14 at 5.

<sup>13</sup> *Id.* at 4, n.3.

provided by the Commission in its 2003 Rulemaking on Coordinated and Independent Expenditures.<sup>14</sup>

### CONCLUSION

The complaints filed by the California Republican Party in MUR 6722 and 6723 lack merit and present no violation. For the reasons set forth herein, the Commission should dismiss the complaints and close the files in these matters.

Very truly yours,



Marc Erik Elias  
Daniel B. Nudelman  
Counsel to House Majority PAC

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<sup>14</sup> Explanation and Justification, Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) ("[P]aragraph (b) of section 109.20 addresses expenditures that are not made for communications but that are coordinated with a candidate, authorized committee or political party committee."). *See also* First General Counsel's Report, MUR 6037 (Merkley) September 17, 2009, at 13 (rejecting application of § 109.20(b) to a communication and citing 68 Fed. Reg. 421).